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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KUN SUL LEE, Plaintiff and Appellant, v. JAMES JUNG et al., Defendants and Respondents.	B206683 (Los Angeles County Super. Ct. No. BC350280)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Law Offices of James A. Kim and James A. Kim for Plaintiff and Appellant.

Herzfeld & Rubin, Michael A. Zuk and Stephanie L. Rockey for Defendants and Respondents.

Plaintiff and appellant Kun Sul Lee, an individual and successor-in-interest and surviving spouse of decedent Mul Soon Lee (Lee), appeals from the judgment entered in favor of defendants and respondents James Jung, M.D., and Jung Medical Center, Inc. after the trial court granted defendants' summary judgment motion in a medical malpractice action. Plaintiff contends summary judgment was improperly granted because (1) Jung's declaration as an expert was not based on personal knowledge or admissible evidence; (2) the medical records relied upon by Jung to support his expert opinion were not properly authenticated, were hearsay, and were not before the trial court, and therefore could not form the basis for Jung's opinion under the reasoning of *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735 (*Garibay*); (3) the trial court abused its discretion on evidentiary rulings when it determined the action was based on the practice of internal medicine and then sustained objections to plaintiff's expert's declaration on the basis the witness was not an expert in internal medicine; and (4) there is a disputed issue of fact as to whether Jung's conduct was consistent with the appropriate standard of care.

We hold that Jung's declaration was sufficient to shift the burden of proof on summary judgment, a sufficient foundation was established for reliance on the medical records, the trial court properly sustained evidentiary objections to the declaration of plaintiff's medical expert, and summary judgment was properly granted. The judgment is affirmed.

Allegations of the Complaint

Plaintiff filed the action on April 6, 2006, alleging that Lee was a patient of Jung. Lee was recovering from hip surgery. As part of Lee's care, Jung hired and supervised a nurse at Lee's home to monitor her health and administer drugs. Lee was rushed to the hospital, where she died on January 7, 2005. Jung described the cause of death as "multiple medical conditions such as sepsis, stroke, pneumonia, renal failure and diabetes

mellitus related complications." Plaintiff learned that the nurse did not give Lee her prescribed medicine, which was the cause of her death.

In the first cause of action for medical malpractice, plaintiff alleged Jung failed to use reasonable care in hiring, supervising, and monitoring the nursing staff, which resulted in injury and death to Lee. The second cause of action, for negligence, contained similar allegations. The third cause of action for negligent hiring and supervision alleged Jung knew or should have known the two employees caring for Lee were unfit and presented an undue risk to her, but they were hired anyway and caused injury and death to her. The fourth cause of action alleged Lee was over the age of 65 and was not provided needed medication, constituting elder abuse, which resulted in injury or death to her. Finally, the fifth cause of action for wrongful death alleged that the conduct of defendants resulted in Lee's death.

Jung's Motion for Summary Judgment

Defendants moved for summary judgment/and or summary adjudication on the basis that the undisputed facts showed that Jung complied at all times with the standard of care, and their actions did not cause injury or harm to Lee. Defendants argued the action for negligence abated upon Lee's death. There was no triable issue of material fact as to the negligent hiring cause of action because Jung never hired or employed the nurse, who was employed by a third party. The undisputed evidence did not establish that Jung committed elder abuse.

Defendants' motion was supported by Jung's eight-page declaration, which stated he had personal knowledge of the facts stated therein except for those stated on information and belief. According to his declaration, Jung has been a physician licensed to practice law in California since 1990. He served a clinical fellowship in internal medicine from 1988-1999, was a senior medical resident for two years, and has been in private practice since 1993. Based on his training, education, and experience, Jung is familiar with the standard of care for physicians treating patients such as Lee.

Jung is president and sole shareholder of Jung Medical Center, Inc. He has personal knowledge of all business and professional dealings and relationships of Jung Medical Center, Inc. Jung maintained records of the treatment and care of Lee, including notations and entries regarding care provided by Jung. Defendants also received summaries and medical records regarding her care and treatment by other physicians and from three hospitals. Jung reviewed all these records in connection with this action.

Jung treated Lee as an outpatient from November 1999 until September 2004. Lee was also undergoing treatment by various medical care providers. She was hospitalized multiple times and spent long periods in rehabilitative facilities. Lee experienced several falls due to weakness and recurrent cerebrovascular accidents (CVA's) and suffered from a variety of ongoing ailments.

All of the medical care Jung provided to Lee was on an outpatient basis at Jung's medical offices. Jung provided appropriate care to Lee as an outpatient on 18 dates between January 5 and September 10, 2004. Plaintiff alleges negligent acts or admissions by the home healthcare nurse Young Sook Kim, but Jung did not hire or employ Nurse Kim. However, he did approve Lee's referral for home healthcare services on multiple occasions.

Plaintiff's complaint and discovery requests indicated plaintiff is alleging medical negligence by acts or omissions by Nurse Kim, while under the employ of a number of home nursing care agencies, for failing to provide proper care and medication for Lee's blood pressure condition during an unspecified period spanning several unspecified years leading up to her final hospitalization and death. Jung did not hire Nurse Kim or any nurse or other healthcare provider to provide medical care for Lee at her home or any other location outside of her visits to Jung Medical Center, Inc.

Jung provided various appropriate medication prescriptions and medical orders to the home health service providers to properly attend to Lee's medical needs around April 6, 2004, until her transfer to Temple Community Hospital around August 3, 2004. Jung received periodic reports of Lee's medical condition from the home healthcare nurse and then made appropriate adjustments in her medications and treatment.

When informed by the home healthcare nurse on September 22, 2004, that Lee had suffered another CVA, Jung appropriately ordered Lee admitted to the hospital the following day. Jung did not examine or treat Lee thereafter, up to, and including her death on January 8, 2005. Lee expired in the hospital due to complications arising from multiple morbid conditions.

Jung opined that all medical care provided by him was within the standard of care in the community. He examined Lee as an outpatient, reviewed all laboratory results and medical reports, prescribed appropriate medication, and tendered proper care for a period of five years. Jung monitored reports from Lee's home healthcare services providers and made appropriate adjustments to her medication, treatment, and care. He caused her to be hospitalized when she suffered another CVA in September 2004. No act or omission by Jung caused or was a substantial factor in her CVA in September 2004 or her death in January 2005.

In Jung's separate statement of undisputed facts, he set forth the following: his medical credentials and connection to the medical corporation; that medical records were maintained regarding the care provided by Jung and others, which he reviewed; Lee's medical condition included all that was wrong with her; all medical care was provided on an outpatient basis; Jung examined Lee and provided appropriate care on multiple dates; plaintiff's allegations relate to care provided by Nurse Kim, whom Jung did not hire or employ, nor did he hire or employ any other nurse for Lee; and Jung did approve referral for home healthcare services for Lee.

Plaintiff's Opposition to Summary Judgment

Plaintiff argued that defendants' motion for summary judgment was not supported by admissible evidence because Jung admitted he had no personal knowledge of the facts and was therefore relying on the hearsay statements of others. The documents Jung relied on do not contain notes or records to support his contentions. Jung is not board certified in internal medicine. He did not have any nurse's notes necessary for Lee's care

and her vital signs were not documented. Instructions given to the nurse were insufficient. His opinion about the care of Lee is without foundation because records and notes were never generated, maintained, or reviewed by him. Jung never attempted to identify what records he reviewed or relied upon to reach his conclusion that he provided appropriate medical care, because the records do not exist. Jung's declaration is merely conclusions, not facts.

Plaintiff's opposition to summary judgment relied upon two expert declarations—one from Dr. Marvin Pietruszka and another from Nurse Jennifer M. Basa—both of which were stricken based on evidentiary objections made by Jung. No argument is made on appeal concerning the ruling on Nurse Basa's declaration, which will not be further discussed.

Because the admissibility of Dr. Pietruszka's declaration is essential to our resolution of the appeal, we set it forth in full. Dr. Pietruszka declared under penalty of perjury as follows:

"1. I am aware of the matters stated herein of my own knowledge and if called upon to do so, I could and would competently testify thereto in a court of law.

"2. I am a medical doctor, licensed to practice in the State of California. I have been an internist, pathologist and medical director of Del Carmen Medical Center since 1980. I received an undergraduate degree from Hunter College, City University of New York, in 1969, and a medical degree in 1972, from The Autonomous University of Guadalajara. I completed a rotating internship in 1973, at the Mayaguez Medical Center at the University of Puerto Rico. I completed my residency in pathology and fellowship in immunopathology at the University of Pittsburgh School of Medicine in 1977. I was certified by the American Board of Pathology in 1977, in both anatomic and clinical pathology. In 2004, I completed a Master's of Science program in Forensic Toxicology at the University of Florida. I received a Graduate Diploma in Toxicology from The Royal Melbourne Institute of Technology, School of Medical Sciences in Australia in 2005. In 2006, I was board certified in occupational medicine by the American Board of Preventive Medicine.

"3. I am a Clinical Associate Professor of Medicine in the Department of Pathology at Keck School of Medicine at the University of Southern California, since 1977, where I regularly teach pathologic mechanisms of disease. My teaching experience includes classes on diseases of the respiratory and cardiovascular systems as well as clinical-pathological correlation. As a clinician, I have treated thousands of acutely ill patients in the medical/surgical and intensive care units of many San Fernanado Valley Hospitals. I am currently on the staff of both Encino-Tarzana Regional Medical Center and Valley Presbyterian Hospital.

"4. A copy of my CV, detailing my training and experience, is attached hereto.

"5. In formulating my opinion about this case, I have reviewed the following documents: Inventory Log of Prescribed Pills; Declaration of James Jung, MD; Deposition transcript of James Jung, MD; Deposition transcript of HHSC; Medical Records from Home Health Services of California; Medical Records from Millenia Home Health Care; Medical Records from Lotus Home Healthcare; Medical Records from Jung Medical Center; and Medical Records from Temple Community Hospital.

"6. The review of records indicates that Ms. Mul Soon Lee ('Ms. Lee'), the decedent, was a 70-year-old Korean female, with a history of diabetes mellitus, hypertension, chronic obstructive pulmonary disease, renal dysfunction, anemia, and congestive heart failure.

"7. It is my understanding that prior to her hip fracture, Ms. Lee was active and ambulatory. On or about March 17, 2004, Ms. Lee suffered a hip fracture. After the hip fracture, Ms. Lee required assistance for her daily needs and was bedridden for a substantial period up until the final incident requiring her hospitalization and her subsequent death on January 7, 2005.

"8. On or about April 19, 2004, Ms. Lee suffered a cerebrovascular accident ('CVA'), with a left-side hemiparegia.

"9. During this time, Ms. Lee was under the care of nurse Yeon Sook Kim, who worked for various nursing services. Nurse Kim received instructions from Dr. Jung and Dr. Jung was the primary physician that Nurse Kim reported to.

"10. Nurse Kim would visit Ms. Lee on a regular basis and would regularly report to Dr. Jung regarding the status of Ms. Lee.

"11. Nurse Kim was aware that Ms. Lee was not taking her medications that were prescribed to her. It was Nurse Kim's practice to fill Ms. Lee's daily pill jars for the patient. In spite of her awareness of Ms. Lee not taking her medicine, she did not advise Dr. Jung and there was no record keeping, either by Nurse Kim or Dr. Jung, regarding the patient's use, or non-use of the prescribed medications.

"12. Dr. Jung examined Ms. Lee on numerous occasions during the many years that he cared for her, however the medical records submitted for review do not demonstrate the visits with Dr. Jung, nor do they demonstrate that vital signs were taken in the course of his evaluations. Of specific importance is the absence of any nursing notes from the nursing agencies. Typically, the nursing agencies would forward copies of the patient's medical records to the primary physician on a regular basis. However, Dr. Jung's file contains no nurses' notes or records.

"13. Nevertheless, a notation in the Hollywood Presbyterian Health Center record report of Dr. Andrew Yi states that Ms. Lee's blood pressure ranged from 150/71 to 160/80, and increased to 170 systolic with exertion.

"14. It is my opinion that the failure of Ms. Lee to take her medication on a regular basis prescribed ultimately resulted in worsening of her renal dysfunction and caused her to develop renal failure. Furthermore, the failure of Ms. Lee to take her medication properly resulted in her developing a second CVA, which resulted in further debilitation.

"15. Development of two CVAs, in a relatively short time, should have raised a red flag for Dr. Jung. Dr. Jung should have evaluated the patient more closely in order to define [*sic*] specific cause [of] her CVA. Further investigation would have revealed that Ms. Lee was not taking her medications as prescribed.

"16. The above-mentioned events resulted in Ms. Lee developing into a chronic debilitated and weakened state, which predisposed her to developing an exacerbation of

chronic obstructive pulmonary disease and aspiration pneumonia. It is these conditions that ultimately resulted in her demise on January 7, 2005.

"17. The failure of Ms. Lee to receive the prescribed medication required by her contributed to her demise. Over the course of her treatment, Ms. Lee was prescribed by Dr. Jung, and/or Jung Medical Center, the various medications including furosemide, diovan, norvasc, prevacid, glucovance, risperdal, metoclopramide, potassium chloride, zocor, isosorbide, folic acid, metroprol, zaraxolyn, hydrochlorothiazide, atenolol, and klor-con. Ms. Lee did not receive important medication, as required, that impacted on her medical conditions, include[ing] furosemide, hydrochlorothiazide, norvasc, atenolol, metoclopramide, potassium and folic acid.

"18. It is my opinion that Dr. Jung practiced below the standard of care in not communicating properly or appropriately with the nurse caring for Ms. Lee and by not investigating the source of the CVAs.

"19. It is my opinion that had Dr. Jung more closely monitored the care of Ms. Lee, Ms. Lee would not have developed renal failure and the abovementioned CVA, and become so debilitated with pneumonia, ultimately resulting in her demise."

Plaintiff opposed summary adjudication on the ground that Jung's separate statement failed to separately address each cause of action as required by Code of Civil Procedure section 437c, subdivision (b)(1) and rule 3.1350(b) of the California Rules of Court. Plaintiff also argued summary adjudication was improperly granted on the merits.[1]

Plaintiff's Objections to Jung's Expert Declaration

Plaintiff objected to Jung's declaration on the grounds that Jung was not qualified as a witness (Evid. Code, § 720), he lacked personal knowledge (Evid. Code, § 702, subd.

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[1] As neither side has briefed the issue of summary adjudication, it will not be addressed on appeal.

(a)), there was no foundation for his opinion (Evid. Code, § 140), and provided improper opinion testimony (Evid. Code, §§ 720, subd. (a), 1200, subd. (a)).

Jung's Evidentiary Objections to Plaintiff's Expert Declaration

Jung filed evidentiary objections to the declaration of Dr. Pietruszka, arguing that Dr. Pietruszka's opinions were inadmissible conclusions, lacking in foundation, and in violation of Code of Civil Procedure section 437c, subdivision (d) and Evidence Code sections 720, subdivision (a), 801, and 802. Jung is an internist, but Dr. Pietruszka is a pathologist, forensic toxicologist, and lawyer, and only an internist could testify to the standard of care. Moreover, Dr. Pietruszka did not state in his declaration that he is familiar with the standard of care.

The Trial Court's Tentative Ruling and Ruling on the Evidentiary Objections and Motion for Summary Judgment

The trial court's written tentative ruling was that Jung's declaration was admissible to establish the standard of care for an internist and the evidentiary objections were irrelevant to that subject. Under summary judgment practice, Jung's declaration was sufficient to establish that his conduct met the standard of care and to shift the burden of establishing a triable issue of material fact to plaintiff.

Turning to the opposition, the trial court's tentative ruling was that the case involved the specialty of internal medicine, Dr. Pietruszka is not an internist, and Dr. Pietruszka failed to declare that he is familiar with the standard of care for internists. Although Dr. Pietruszka's declaration stated in conclusory form that he has been an internist, his declaration and curriculum vitae demonstrate the doctor has extensive experience in pathology and somewhat recently became board certified in occupational medicine, areas of medicine distinct from internal medicine. This would not require striking the declaration if it demonstrated Dr. Pietruszka was sufficiently familiar with

internal medicine even though he does not appear to practice it under the holding in *Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 128. However, Dr. Pietruszka's declaration does not establish that he has gained knowledge of the standard of care applicable to the specialty of internal medicine. Due to the deficiencies in Dr. Pietruszka's declaration, plaintiff failed to demonstrate the existence of disputed issues of material fact, and summary judgment was appropriate.

At the hearing on the motion, the trial court confirmed its tentative ruling, finding that Jung is an internist, but Dr. Pietruszka "is basically a pathologist." The trial court conceded that Dr. Pietruszka had "done some clinical work" but the expert "doesn't state he is familiar with the standard of care for internists or for patients of Ms. Lee's condition. Dr. Pietruszka "isn't in a position to give us an opinion on this matter. And that is basically all you got with respect to the liability of Dr. Jung." The evidentiary objections were sustained to Dr. Pietruszka's declaration, and summary judgment was granted.

DISCUSSION

I

SUFFICIENCY OF JUNG'S DECLARATION TO SHIFT THE BURDEN TO PLAINTIFF TO DEMONSTRATE A DISPUTED ISSUE OF MATERIAL FACT

Plaintiff first argues Jung's declaration was insufficient to shift the burden of demonstrating the existence of a triable issue of material fact. Plaintiff contends Jung's declaration contained "a boilerplate and generic conclusion that he acted within the 'applicable standard of care in the community,'" which is insufficient to support summary judgment under *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 (*Trunk*). Plaintiff further argues that Jung's declaration was inadmissible because the medical records upon which he relied were not properly authenticated nor were they before the trial court, as required by *Garibay*, *supra*, 161 Cal.App.4th 735.

A. Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

"Like the trial court, we must strictly construe the moving papers and liberally construe the materials offered in opposition. The evidence in support of and in opposition to the motion must be viewed in the light most favorable to the party against whom summary judgment was entered; due to the drastic nature of the procedure, all doubts about the propriety of granting the motion must be resolved in favor of its denial. [Citations.]" (*Asplund v. Selected Investments in Financial Equities, Inc.* (2000) 86 Cal.App.4th 26, 36-37.)

B. Admissibility of Jung's Declaration under *Trunk*

In *Trunk*, the court held that a expert's declaration in a medical malpractice action that merely concluded the defendant doctor's conduct fell within the standard of care without any reasons or explanations "does not establish the absence of a material fact issue for trial, as required for summary judgment." (*Trunk, supra*, 66 Cal.App.4th at

p. 524.) "Without illuminating explanation, it was insufficient to carry [the defendant's] burden in moving for summary judgment." (*Ibid*.)

Jung's declaration does not suffer from the deficiencies identified in *Trunk*. Jung specifically detailed that he examined Lee as an outpatient, reviewed all laboratory results and medical reports, prescribed appropriate medication, and tendered proper care. He monitored reports from Lee's home healthcare services providers and made appropriate adjustments to her medication, treatment, and care, and caused her to be hospitalized when she suffered another CVA. Jung did not employ or hire any of the healthcare services providers whom plaintiff alleges failed to properly administer prescribed medications. His statement that he committed no act or omission that was a substantial factor in her CVA in September 2004 or her death in January 2005 is not a mere conclusion. To the contrary, Jung's opinion was based on his detailed explanation of the treatment he provided. The declaration was sufficient under *Trunk*.

C. Admissibility of Jung's Declaration Under *Garibay*

Plaintiff next contends the trial court erred in overruling an evidentiary objection to Jung's declaration under the reasoning of our colleagues in Division Three in *Garibay, supra,* 161 Cal.App.4th at page 743, an opinion filed after the trial court's ruling. We disagree.

In *Garibay*, summary judgment was granted in favor of a doctor in a medical malpractice action based upon a nonparty's expert opinion that the defendant doctor did not commit malpractice. "The main issue on appeal is whether an expert medical witness's declaration, setting forth facts of the surgery performed on plaintiff Garibay based on the expert witness's review of hospital and medical records which were not properly before the court, was sufficient to meet the burden of the production of evidence required of the party moving for summary judgment." (*Garibay, supra,* 161 Cal.App.4th at p. 740.) The defendant's expert based his opinion on his review of hospital and medical records, which did not accompany the declaration or the summary judgment

motion, and which were not admitted into evidence under the business records exception to the hearsay rule. (*Garibay*, *supra*, 161 Cal.App.4th at p. 737.)

"The summary judgment motion was insufficient because there were no facts before the court on which the expert medical witness could rely to form his opinion. The expert was not a percipient witness to and could not testify about what happened during the surgery. A proper method for producing these facts would have been, for example, by means of a declaration or deposition testimony from the doctor who performed the surgery, or by properly authenticated medical records placed before the trial court under the business records exception to the hearsay rule. Defendant's summary judgment motion, however, failed to place medical records before the trial court under the business records exception to the hearsay rule, and therefore those records could not provide evidence to support the expert medical witness's opinion or the summary judgment motion. Only after the facts were properly before the trial court could the expert form an opinion, and could the defendant moving for summary judgment meet his burden of production. Because the summary judgment motion lacked any evidentiary basis, it failed to make the factual showing required to shift the burden to the plaintiff. The grant of summary judgment must be reversed." (*Garibay*, *supra*, 161 Cal.App.4th at pp. 737-738.)

The defense expert in *Garibay* attempted to testify in his declaration to the facts of the medical procedure without personal knowledge of those facts, relying on medical records which were not before the court pursuant to the business records exception to the hearsay rule. (*Garibay*, *supra*, 161 Cal.App.4th at p. 743.) "Without those hospital records, and without testimony providing for authentication of such records, [the defense expert's] declaration had no evidentiary basis," and "his expert medical opinion . . . had no evidentiary value. [Citation.]" (*Id.* at p. 742.)

"We realize that although hospital records are hearsay, they can be used as a basis for an expert medical opinion. However, 'a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact.' (*People v. Gardeley* (1996) 14 Cal.4th 605, 619.) 'Although experts

may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact.' (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525.) Physicians can testify as to the basis of their opinion, but this is not intended to be a channel by which testifying physicians can place the opinion of out-of-court physicians before the trier of fact. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 895.) Through his declaration, [the defense expert] attempted to testify to the truth of the facts stated in the declaration for an improper hearsay purpose, as independent proof of the facts." (*Garibay, supra*, 161 Cal.App.4th at p. 743.)

Garibay is distinguishable from this case. The expert witness in *Garibay* was a third party to the litigation, who had no personal knowledge of the events at issue. All of the expert's information came from the medical records of the defendant doctor, which were never authenticated. In contrast, the defense expert in this case—Jung—was a party who established his personal knowledge of the maintenance of medical records of Lee by his office, as well as his personal knowledge of the facts stated in his declaration.

According to his declaration, Jung maintained medical records of Lee's treatment and care, which he reviewed in connection with the case. Those records include notations and entries regarding the care provided by Jung and reports, summaries, and medical records routinely sent to Jung for his review regarding Lee's treatment and care provided by other physicians and healthcare services providers, including three hospitals. Jung's declaration sets forth the dates he treated her and the conditions she suffered. Moreover, plaintiff's case was based on a claim of negligent hiring and supervision of nursing staff that was to administer medication to Lee, and Jung declared he did not hire or supervise any nursing staff for Lee.

As Jung's declaration contains an adequate foundation to support a finding of personal knowledge of the records in this case, we hold that *Garibay* is not controlling. This conclusion is consistent with the holding of our Supreme Court in *People v. Gardeley, supra*, 14 Cal.4th 605, in which the trial court permitted a detective to testify to hearsay information he relied upon in concluding that the defendants were members of a criminal street gang for purposes of Penal Code section 186.22. The detective based his

opinion on conversations with the two defendants and other gang members, his investigation of numerous crimes committed by gang members, and "information from his colleagues and various law enforcement agencies." (*People v. Gardeley*, *supra*, at p. 620.)

"Evidence Code section 801 limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .' (*Id.*, subd. (b).)" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 617.)

"Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.) Of course, any material that forms the basis of an expert's opinion testimony must be reliable. (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 477, p. 448.) For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' (*Kennemur v. State of California, supra,* at p. 923.)

"So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base 'opinion on reliable hearsay, including out-of-court declarations of other persons']; see Fed. Rules Evid., rule 703, 28 U.S.C.; 2 McCormick on Evidence [(4th ed. 1992)] § 324.3, pp. 372-373.) And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying,

describe the material that forms the basis of the opinion. (*People v. Shattuck* (1895) 109 Cal. 673, 678 [medical expert could testify to patient's complaints in order 'to give a clinical history of the case to understand the significance of her symptoms']; *McElligott v. Freeland* (1934) 139 Cal.App. 143, 157-158 [certified public accountant could testify to information he relied on in property valuation]; see *People v. Wash* (1993) 6 Cal.4th 215, 251 [prosecution could elicit out-of-court statements relied on by the defense expert]; 2 McCormick on Evidence, *supra*, § 324.3, p. 372 [explaining that under rule 703, Fed. Rules Evid., which allows the expert to disclose to the trier of fact the basis for expert opinion, '[t]he result is that often the expert may testify to evidence even though it is inadmissible under the hearsay rule.'].)" (*Gardeley*, *supra*, 14 Cal.4th at pp. 618-619.)

We are satisfied that Jung's declaration, based upon medical records maintained by his office pertaining to Lee's care, was the type of material an expert may rely upon in rendering an opinion in a malpractice action. The problem confronting the court in *Garibay* is simply not present in this case. As *Gardeley* makes clear, the records themselves need not be admissible or admitted if the test of reliability is satisfied. Plaintiff's objections to Jung's declaration were properly overruled.

II

THE TRIAL COURT PROPERLY SUSTAINED EVIDENTIARY OBJECTIONS TO DR. PIETRUSZKA'S DECLARATION

The trial court sustained the evidentiary objections to Dr. Pietruszka's declaration on the basis that he was not qualified to express an expert opinion. We agree that the declaration was insufficient to establish the required expertise for treatment of a patient in Lee's condition.

As the trial court noted, Dr. Pietruszka's expertise is in pathology and toxicology. He is board certified in occupational medicine, although that specialty is nowhere defined in the record. At no point did Dr. Pietruszka state he was familiar with the standard of care for treating a patient in Lee's condition. In fact, his declaration makes no reference

to any specific experience or training in the proper treatment of patients with diabetes and CVA's.

The only information provided regarding Dr. Pietruszka's treatment of patients is his statement that he had "treated thousands of acutely ill patients in the medical/surgical and intensive care units of many San Fernando Valley Hospitals." There is no indication of what medical issues he has confronted in this treatment and no reference to ever treating any patient with a condition similar to Lee's. Most significantly, plaintiff's theory was that Jung was negligent in hiring and supervising nursing staff, and Dr. Pietruszka's declaration is totally silent as to his knowledge of that subject or the standard of care in this area.

It is true that the rules regarding expert's qualification in medical malpractice cases have been liberalized over time. (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470.) Moreover, there is no requirement that the expert be a specialist in the particular field involved in a case. (*Evans v. Ohanesian, supra,* 39 Cal.App.3d at p. 128.) "The test for determining familiarity with the standard of care is knowledge of similar conditions. [Citation.]" (*Avivi v. Centro Medico Urgente Medical Center, supra,* at p. 470.)

Liberally construing plaintiff's evidence in opposition to summary judgment, it is clear that Dr. Pietruszka's declaration fails to establish any familiarity with the standard of care of conditions similar to Lee's. While it is entirely possible a pathologist or toxicologist could have the necessary training or expertise to express the opinions found in Dr. Pietruszka's declaration, the declaration is completely silent on this subject. There is no means for this court to infer the requisite knowledge based on the gaps in Dr. Pietruszka's declaration.

Plaintiff emphasizes the contention that the trial court erred in ruling that this case involved internal medicine, because Jung did not so state in his declaration. We disagree for two reasons. Reasonably construed, Jung's declaration does support a finding the case involved internal medicine. Internal medicine was his specialty, he defined it as the diagnosis and treatment of adult medical problems, and it was in that capacity that he

treated Lee. In any event, regardless of whether this action involved the practice of internal medicine, the fact remains that Dr. Pietruszka's declaration makes no mention of any training, skill, or experience in treating patients in Lee's condition. The trial court properly sustained Jung's evidentiary objections to Dr. Pietruszka's declaration.

III

SUMMARY JUDGMENT WAS PROPERLY GRANTED

Plaintiff's final argument is that summary judgment was improperly granted because there are disputed material issues of fact. Our determination that Jung's declaration was sufficient to shift the burden to plaintiff, and that Dr. Pietruszka's declaration was properly stricken, resolves the issue. Summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Defendants James Jung and Jung Medical Center, Inc. are awarded costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.